

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 17 1996

In the Matter of

Implementation of Section 34(a)(1)
of the Public Utility Holding
Company Act of 1935 as added by the
Telecommunications Act of 1996

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GC Docket No. 96-101

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COMMENTS OF THE ASSOCIATION FOR
LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Services ("ALTS") hereby submits its initial comments in the above-captioned proceeding pursuant to the Notice of Proposed Rulemaking, FCC 96-192 (released April 25, 1996). ALTS is the non-profit national trade association representing competitive providers of local telecommunications services. ALTS' membership includes over thirty non-dominant providers of competitive access and local exchange services that deploy innovative technologies in many metropolitan and suburban areas across the country.

As providers of local service, ALTS' members will compete directly with public utility holding companies which may now enter the telecommunications industry. ALTS has been a major proponent of opening the local telecommunications market to any and all competitors and worked hard with Congress and the Commission to ensure, initially, that the Telecommunications Act

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of 1996¹ was enacted, and, now, that it be implemented in a fair and competitively neutral manner. The members of ALTS believe that companies should be able to enter the market with little or no governmental oversight except in areas where necessary to control anticompetitive behavior. In this instance the Commission has proposed rules that do not adequately protect against potential anticompetitive practices by public utility holding companies.

In the Notice of Proposed Rulemaking, the Commission has indicated that it intends to grant all applications for exempt telecommunications company ("ETC") status without any consideration of public interest issues. The Commission stated that "the Commission's responsibilities under section 34(a)(1) do not appear to extend beyond a determination of whether an applicant complies with the relatively narrow certification criteria" of Section 34(a)(1) of the Public Utility Holding Company Act. (Notice at para. 8) In addition, the Commission proposed that it would "limit consideration of any submission that might be made [in response to an ETC application] to the narrow purpose of determining the adequacy or accuracy of the certification made to satisfy the statutory criteria." (Id. at para. 13)

ALTS respectfully submits that the Commission would be shortsighted were it to adopt its proposed rules, which, in

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996).

effect, make the ETC determination largely ministerial. The Commission should not ignore the fact that public utility holding companies are in a powerful position to discriminate against other providers of telecommunications services with respect to use of the utility's poles, ducts, conduits and rights of way controlled or owned by it. In this area, public utility holding companies are in virtually the same position as the incumbent local exchange carriers in holding the key to competitors' ability to provide service. The Commission should recognize, as Congress has, that for facilities-based local competition to develop, access to the bottleneck facilities of the utilities must be made available on nondiscriminatory and cost-based terms.

Prior to the passage of the '96 Act, utility companies were not required to provide access to their poles, ducts, conduit or rights of way to telecommunications carriers. In a number of instances ALTS members who had requested access to them were thwarted in their attempts to gain access to utility company poles and were unable to come to satisfactory agreements in a reasonable amount of time. Although the '96 Act requires public utilities to provide access to poles to other telecommunications companies,² the Act also now allows the utilities to become "exempt telecommunications carriers" and provide service. Thus, while utilities didn't have much incentive to provide access before passage of the act, they now have added incentive to

² Id. Section 703.

discriminate in favor of their own telecommunications subsidiaries. In fact, at least two members of ALTS have been told by Entergy Corp. (whose subsidiaries were recently granted ETC status) that access to poles would not be provided in the time period originally agreed upon.

The Commission must recognize the incentive and ability of the utilities to discriminate against its competitors and fashion rules that ensure that the companies provide nondiscriminatory access to all telecommunications providers to their poles, duct, conduit or rights of way. In order to do this, the Commission should: 1) require a specific statement in each ETC application to the effect that the public utility holding company will make available to all competitors access to its poles, ducts, conduit and rights of way on a nondiscriminatory basis, and 2) condition the grant of any ETC application on the company's making available upon request all contracts or agreements that it has with any ETC subsidiary for use of or access to poles, ducts, conduit or rights of way. In addition, if questions of discriminatory practices are raised, the Commission should consider conditioning the grant of any ETC application on the public utility company and its subsidiaries' compliance with Sections 151 and 224 of the Telecommunications Act and any regulations promulgated thereunder.

In the NRPM the Commission stated that applicants would be required to "certify that they satisfy . . . any applicable Commission regulations." However, the proposed regulations

attached to the NPRM were devoid of any such requirement. It is important that the Commission require such a certification and that the certification specify that the applicant will comply with all laws and regulations relating to nondiscriminatory access to poles, ducts, conduit and rights of way. ALTS suggests that the Commission add to proposed section 1.4002(a) a subparagraph as follows:

(4) A sworn statement, by a representative legally authorized to bind the applicant, certifying that the applicant will comply with all requirements of the Telecommunications Act of 1934, as amended, and specifically with Sections 151(b) and 224 and any rules promulgated thereunder with respect to the provision of non-discriminatory access to poles, ducts, conduit and rights of way to any other telecommunications carrier.

The Commission should also condition ETC grants on the company's making public any agreement or contract it has with its parent company for use of, or access to, poles, conduit, ducts and rights of way, upon request by a competing carrier. There is no way to ensure that contracts are nondiscriminatory if they are not available for public inspection. This requirement would be entirely consistent with the '96 Act. Subsection (g) of Section 703 provides that whenever a utility engages in the provision of telecommunications services it shall impute to its costs of providing such service (and charge any affiliate engaged in the provision of such service) an equal amount to the pole attachment rate for which such company would be liable under Section 703. In addition, the requirement to make public agreements between the utilities and their telecommunications subsidiaries relating

to pole attachments is consistent with a long line of Commission decisions involving a competitive subsidiaries' procurement of monopoly services from a parent company.³

In the NPRM the Commission also proposed that comments on any ETC application be limited to the adequacy and accuracy of the representations contained therein. The Commission stated that "an ETC determination should not involve an inquiry into the public interest merits of entry by the applicant" and that the public interest would not be served if the ETC certification process became a "regulatory barrier to significant new entry into the telecommunications industry." (*Id.* at para. 2). There is absolutely nothing in the '96 Act, however, that would preclude the Commission from considering the applicant's present and past actions with respect to their compliance with pole attachment regulations and the '96 Act. Should it be shown that a particular applicant had a history of refusing to deal with competitors on a nondiscriminatory basis, the Commission should consider conditioning any ETC grant on compliance with the Act and regulations promulgated thereunder.⁴ A company that

³ See, e.g., Amendment of Section 64.707 of the Commission's Rules and Regulations (Computer II), 77 F.C.C.2d 384 (1980), *aff'd sub nom. Computer and Commun. Indus. Ass'n v. Fcc*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

⁴ While we agree with the Commission that Congress clearly intended to allow another segment of the business world to become strong competitors in the telecommunications arena, to argue, as the Notice seems to, that the Commission should automatically grant all ETC applications without consideration of anything other than the veracity of the statement that the company intends to provide telecommunications services, would eviscerate the

knows that noncompliance with the rules could lead to withdrawal of ETC certification, will have a much greater incentive to negotiate on a good faith basis.

Respectfully submitted,

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June 17, 1996

requirement that the utilities seek ETC status. If the Congress intended all companies to automatically have ETC status, it could have done so without including a requirement that the utilities apply to the Commission for ETC status.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of the Association for Local Telecommunications Services dated June 17, 1996, were served on the following persons by United States mail or by hand service as indicated.


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